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In the Matter of)	
)	
Reexamination of the Comparative)	MM Docket No. 95-31
Standards for Noncommercial)	
Educational Applicants)	
_____)	

SUMMARY of COMMENTS of LAREDO COMMUNITY COLLEGE

The backlogged applications for educational stations have now been on file for two-and-a-half-years. Many of these proposal reflect urgent needs in support of Congressionally favored and funded programs. The Commission should respond to the overriding public interest in getting this service to the public without further delay. The Commission should promptly triage this finite number of applications in accordance with the objective criteria spelled out in these comments. Particularly if the formulation of selection criteria, such as weighted lotteries, will require a prolonged period to complete, then the Commission is fully justified in dealing with triaging the discrete group of already "cut off" applications in advance of adoption of more permanent selection methods and criteria.

COMMENTS

Laredo Community College, applicant for Channel *39 in Laredo, Texas, file no. BPET 96-0809KI, submits these comments in response to the Further Notice of Proposed Rulemaking (FCC 98-269), released October 21, 1998. By order (DA 98-2489) the time for filing comments was extended to January 28, 1999.

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Laredo Community College's application was filed August 8, 1996. A competing application for Channel *39 was also filed by Faith Pleases God Church Corporation, file no. BPET 96-0726KK. On December 26, 1996, Laredo Community College filed a petition to deny the Church's application based on the Church's lack of financial qualifications, the past history of it and its affiliates' failures to construct television stations, and the failure to show availability of its proposed antenna site. Efforts to remove the conflict by negotiations between the two parties have been unsuccessful. As a result, the College's grant applications to NTIA under the Public Telecommunications Facilities Program (PTFP) — though given a high priority by NTIA because of Webb County's 94 percent Hispanic population — could not be approved, because the Commission had not yet processed the application.

I. THE COMMISSION SHOULD TRIAGE THE BACKLOGGED APPLICATIONS WITHOUT WAITING FOR FURTHER STUDIES ON OWNERSHIP DIVERSITY.

The possibility of further delaying the processing of the backlogged applications, while further research is done to support diversity of ownership criteria to be applied to future applications, is not consistent with the public interest. Instead, the Commission should proceed immediately to triage these applications in order to get needed and long-delayed service to the public.¹

¹ File No. BPET 96-0809KI contains, *inter alia*, copies of a letter from Senator Kay Bailey Hutchison to former Chairman Hundt, filed and served on June 19, 1997, a letter from Congressman Henry Bonilla to former Chairman Hundt, filed and served June 3, 1997, both urging prompt action on the College's application, and a favorable recommendation from the South Texas Development Council, filed and served May 14, 1997, based on the clearinghouse evaluation that "the need for service is in great demand."

One of the purposes of processing applications under reasonably defined selection criteria is to discourage speculative applications, whose only economic value is what buy-out payments they can command from *bona fide* applicants to remove them as sources of delay to service. Irrespective of the Commission's economic view as to commercial strike applications reflected in its waiver of Sections 73.35.23(b)(1) and 3525(a)(3) at the end of 1995,² most, if not all, governmental entities are not in a position to use public funds to "pay off" obstructing applications.

The Commission must devise procedures that get service to the viewing public by discouraging such applications. Two changes in procedure should accomplish that end. First, the Commission should define criteria well-enough that every applicant will know whether he has any realistic chance of prevailing or not. Second, as to the "losing" applications that may be filed anyway, the Commission should get them out of the way, before they cause appreciable delay, through a triage procedure. By reducing delay the Commission reduces their "buy-off" value. Knowledge that such applications will be quickly dealt with in turn reduces the economic incentive for the filing of such applications in the first place.

The Commission should not delay processing the backlog to make difficult and controversial studies to support ownership diversity. It seems unlikely that the establishment of such eminently litigatable criteria would cause the voluntary dismissal of already-filed applications. They represent to their respective applicants what economists would call a "sunk cost." The substantial delay in the realization of service to the public would out-weigh any

² Public Notice, FCC 95-391, 10 F.C.C. Rcd 12182 (released Sept. 15, 1995), recon. denied sub nom. Settlements in Comparative Broadcast Proceedings, 11 F.C.C. Rcd 4748 (1996).

possible gain through the application of such new criteria to the finite number of backlogged applications.

At several points in the FNPRM, e.g., ¶¶ 12-13, and 15, the notice alludes to the possibility of devising a weighting system based on preferences for minority-controlled entities that would withstand strict scrutiny in the courts. Realistically speaking, ownership diversity is – as we would say in oil country – a dry hole. Devising such a system is not a task to be completed overnight, if at all. It should not be drilled at the cost of delaying the processing of long-pending-applications. Section 309(i)(3) does not compel such an attempt by the Commission, and the cases cited in footnote 12 of the FNPRM support a decision not to use weighting in a random-selection process. The Congressional purpose can be fulfilled, in processing at least the “cut-off” applications now pending, by reliance on the statutory grant preferences awarded under the Public Telecommunications Facilities Program (PTFP) in Title III(IV)(A) of the Act. Section 392(f) directs the establishment of processing priorities for “increas[ing] minority and women’s ownership of, operation of, and participation in public telecommunications entities.” Section 392(f) also directs the Administrator to “take affirmative steps to inform minorities and women” of the opportunities under PTFP. Because the grant process is not under the judicial restrictions imposed in Adarand, Bechtel, and Missouri Synod, the Commission is free to satisfy the Congressional preference requirement in Section 309(i)(3) through adopting rules giving weight to the Congressionally sanctioned priorities assigned under Section 392(f). Moreover, diversity in ownership in educational broadcasting means something quite different from diversity in ownership in commercial broadcasting. Student bodies are more diverse since Brown v. Board and the Federal education acts. Such constraints do not

automatically apply to commercial broadcasters. There is not the same need in the educational broadcasting services.

Even if it were to try to establish ownership diversity criteria to govern future applications, the Commission should treat the pending, cut-off applications differently. No additional applications can be filed against those that have already been cut-off, so there are no new applications for these assignments to be deterred. But the Commission can do something to reduce the number of mutually exclusive applications among those pending. There are many applications, such as the College's, among those that have been pending for two-and-a-half years, that are "gushers" under any criteria the Commission might establish pursuant to Section 309(a) of the Act. The Commission, if it is willing to apply basic principles of sound management, can triage the finite number of pending applications now, without waiting to define more particularly its standards that are intended to have a deterrent effect on future speculative applications. The establishment of ownership diversity criteria is not likely to reduce the number of mutually exclusive applications in the backlog of "cut-off" cases. While it may be true that some of the presently existing instances of mutual exclusivity cannot practicably be triaged, the mere fact of their not making the "initial cut" may induce some of the applicants to withdraw, further reducing the backlog of service.

Adoption of an ownership diversity criteria would not appreciably simplify the Commission's processing burden. Indeed, the Commission must still make the public interest finding required by Section 309(a), even if it uses random selection procedures under Section 309(j). Paragraph (2) of subsection (j) specifically forbids the Commission from granting an application without the public interest finding prescribed in subsection (a) and the station's

compliance with its rules under Section 308(b).³ Considered in light of Section 309(a), the object of diverse broadcast ownership is not to benefit the minority owners themselves but to benefit the diverse constituents of the listening or viewing audience. See Bechtel v. FCC, 294 U.S.App.D.C. 124, 957 F.2d 873 (1992), after remand, 304 U.S.App.D.C. 100, 10 F.3d 875 (1993).

II. THE COMMISSION SHOULD ADOPT A TRIAGE SYSTEM FOR BACKLOGGED APPLICATIONS BASED ON OBJECTIVE CRITERIA.

The Commission should adopt a objectively based triage system for handling educational applications, or at least for moving along the pending applications that have been cut-off. If the Commission is willing to go back to fundamentals, it is possible to devise within Section 4(j) an easily managed triage system built around objective criteria. The College respectfully submits that the following criteria are susceptible to application in a large number of cases by non-hearing officers, as permitted by Section 309(j)(2)(B) of the Act, quoted above in footnote 4.

The starting point is with the primary purpose of the educational channels, viz., education. All applications eligible under Section 73.503 and -.621 may be equally eligible, but they are not equal under an appropriate view of the public interest, and the Commission is not obliged to treat them identically. Congress has already pointed to differences in the criteria for

³ Section 309(j)(2) reads as follows:

(2) No license or construction permit shall be granted to an applicant selected pursuant to paragraph (1) [i.e., by lottery] unless the Commission determines the qualifications of such applicant pursuant to subsection (a) and section 308(b). When substantial and material questions of fact exist concerning such qualifications, the Commission shall conduct a hearing in order to make such determinations. For the purposes for making such determinations, the Commission may, by rule, and notwithstanding any other provision of law –

(A) adopt procedures for submission of all or part of the evidence in written form;
(B) delegate the function of presiding at the taking of written evidence to Commission employees other than administrative law judges; and
(C) omit the determination required by subsection (a) with respect to any application other than the one selected pursuant to paragraph (1).

the PTFP. The Commission should look to the criteria applicable to government grants as a Congressional determination bearing on the public interest. Section 392(a)(4)-(5). Whether the facilities program is funded in any given year or not, the criteria have still received Congressional imprimatur, and the Commission may be reasonably governed thereby. In years when the NTIA grants are funded and grant applications are being evaluated, the Commission should give *prima facie* weight to the grant eligibility determinations by the agency to which the Congress has committed such decisions. To the extent that determinations of eligibility should be made among two or more conflicting applications, the Commission should give appropriate weight to the NTIA's assignment of priorities under Section 392.

If application of the PTFP criterion does not result in successful triage, the Commission should consider the degree of taxpayer support. Under our coördinate system of government, education is the primary responsibility of state and local governments. Certainly there is no better indicum that a broadcast facility is integral to the educational system in a community than that it receives taxpayer support, either through the legal right to impose a "mill rate" on real or personal property in the jurisdiction or through a "certificate of need" issued by governmental authority or by appropriations from the public treasury. The Commission has historically taken into account in making EDFM assignments state plans for statewide broadcast networks. Section 73.502. If there is a conflict between tax-supported entities, the Commission should look to see if there exists a mechanism for resolving those conflicts at the state level, where a single state is involved, such as under Section 392(a)(5), or between governmental entities when governmental entities in more than one state are in conflict.

If there remains a conflict between an accredited educational institution on the one hand⁴ and a non-accredited educational institution on the other hand, the Commission's choice should be governed by the accreditation of degree-granting institutions.

To the extent there remain conflicts between educational or cultural institutions, the breadth of financial support from the community would form an appropriate triage criterion.

Successive application of the foregoing triage tiers should eliminate most conflicts between applications. To the extent there remains that irreducible minimum of conflicting applications, the Commission may be forced to employ one of the systems proposed in the FNPRM.

Conclusion

The Commission should act now to triage the backlogged applications. The pre-freeze applications have been pending now for two-and-a-half years! There is an urgent need to bring educational programming service to the public. Considering that it usually takes less than two years to get an associate-level college degree on a fulltime basis, the delay in providing classroom instruction to would-be distance-learners is obviously damaging. The delay has, so to speak, "lost" a college generation. Such delay is just one more obstacle placed in the path of would-be distance learners who want to acquire the skills and credentials outside the classroom to improve their earning power and quality of life. It is also damaging to the rest of the citizens

⁴ See Sections 73.503(a) and 73.621(a), (b). The established accreditation system utilizes accrediting bodies such as the North Central Association of Colleges and Schools. Public primary and secondary schools are variously accredited by public and private agencies. Accreditations by these bodies are recognized by the Federal government in determining grant eligibility. The Commission may wish to solicit the advice of the U.S. Department of Education, Office of Postsecondary Education, Accrediting Agency Evaluation Branch; the Office of Education; and the Commission on Recognition of Postsecondary Accreditation (CORPA) in formulating this criterion.

of the country, who would benefit from higher productivity of these people who have the ambition to make greater contributions to the economy. It is one more unnecessary obstacle to people on the welfare rolls who want to become economically self-sustaining by improving themselves through distance learning. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, P.L. 104-193, codified to Title 42 of U.S.C., embodying the national goal of “welfare to work.” The Commission is mandated by statute to grant licenses to advance the public interest. Section 309(a); see NAACP v. FPC, 425 U.S. 662, 670 n. 7 (1976), holding the FCC’s EEO regulations for broadcasters to be justified by the agency’s “obligation ... to insure that its licensees’ programming fairly reflects the tastes and viewpoints of minority groups.” The first two economic factors are undeniably aligned with the public interest and are validated by a Congressionally funded program, the Public Telecommunications Facilities Program (PTFP). The third is the subject of a specific Congressionally approved and funded program, the PRWORA.

These considerations become compelling where the service area of the station has underserved minority students, as is the case in Laredo.

The College has identified a method that will get most of these applications out of the backlog and on the air. The Commission should deal separately with these applications through application of a triage process, without waiting to fine-tune any of the criteria or procedures it may develop for future applications, where deterrence of speculative applications is a motivating factor.

Respectfully submitted,



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January 28, 1999

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I hereby certify that I have caused to be mailed this day a copy of the foregoing
comments to:

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A handwritten signature in cursive script, reading "William Malone", written over a horizontal line.

William Malone

Washington, D.C.
January 28, 1999